SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949.~~ 1950

No. ~~[illegible]~~ 118

SAVANNAH SUGAR REFINING CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF THE SAVANNAH SUGAR REFINING CORPORATION, APPELLANT, IN REPLY TO MOTIONS TO AFFIRM.

C. R. HILLYER,
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135 South LaSalle Street,
Chicago (3), Illinois.
April 12, 1950.

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Certain of the appellees having filed motions to affirm, pursuant to Rule 12, paragraph 3, of the revised Rules of Practice of the Supreme Court of the United States, the Savannah Sugar Refining Corporation submits herewith its brief opposing said motions, pursuant to Rule 7, paragraph 3.

STATEMENT.

This is a direct appeal from the final judgment and decree of a specially constituted court of three judges dismissing the suit of the Alabama Great Southern Railroad Company and other plaintiffs, including the Savannah Sugar Refining Corporation, to set aside an order of the Interstate Commerce Commission. *Alabama Great Southern Railroad Company, et al.* v. *United States of America, et al.*, No. 49 C 1434. Findings of fact, conclusions of law, and the judgment and decree of the court were entered on January 12, 1950, dismissing the complaint. The appeals of the plaintiffs were allowed on March 7, 1950, and appeal papers were served on Chicago counsel on that date.

The Commission's order, dated June 13, 1949, was made in a proceeding docketed as No. 26712. That was an investigation instituted by the Commission on its own motion into and concerning the reasonableness and lawfulness otherwise of existing differential through routes and joint rates between the barge lines and their rail connections, and for the purpose of determining and establishing such additional reasonable through routes and differentials as might be justified for barge-rail service. *Rail and Barge Joint Rates*, 270 I. C. C. 591.

The Savannah Sugar Refining Corporation, appellant, a party throughout the proceedings before the Commission and the Court, is engaged in the refining of imported and domestic cane sugar at Port Wentworth, Georgia, adjacent to Savannah, Georgia. Its product, refined sugar, is transported via all-rail routes in carloads to consuming markets in all of the states of the southeast, and also to destinations in states north of the Ohio River, covered by the order here under attack.

POSITION OF THE SAVANNAH SUGAR REFINING CORPORATION, APPELLANT.

Said competitive destination region is served by the Savannah refinery at all-rail rates, whereas the competing refiners located in the New Orleans district reach these markets by lower barge-rail differential rates. The position of the Savannah refinery throughout this proceeding has been and is that under Section 3 of the Act to Regulate Commerce prohibiting undue preference and undue prejudice, the barge-rail rates on sugar from New Orleans to competitive markets should be no lower than the corresponding all-rail rates from New Orleans, with which latter rates the rail rates from Savannah have been lawfully related under Section 3 of the Act.

The decision of the Commission describes sugar as of "outstanding importance" in this case. This is supported by the record showing important tonnage of sugar moving from the New Orleans district on the low differential rates, in direct competition with the all-rail tonnage of intervener moving from Savannah to competitive markets via all-rail routes upon which is assessed the higher all-rail rates. The Savannah refinery is the outstanding victim of the existing differential barge-rail rates enjoyed by its competitors.

In prescribing "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water" under Section 307(d) of the Act, the requirements of Section 3 of the Act cannot be ignored for the benefit of one competitor over another, or set aside in a conflict between rail and water carriers.

APPELLANT SEEKS THE ENFORCEMENT OF SECTION 3 OF THE STATUTE.

There was presented to the Court the issue of undue prejudice to the Savannah refinery and the unjust preference to its competitors, in violation of Section 3 of the Act to Regulate Commerce, resulting from the payment by the appellant of the rail rates and the payment by its competitors of the lower barge-rail rates.

That Section 3 of the Act may be said to be its most important provision is recognized by the Supreme Court in many decisions. Both the Commission and the Courts have demanded that Section 3 of the Act be broadly construed and strictly enforced.

> "It was chiefly because of discriminations in freight rates that the Commission was originally established. Section 3 lies at the heart of the Act. It (Section 3) is stated in very broad terms and it should be broadly construed and strictly enforced." (172 I. C. C. 319, 336.)

The Supreme Court has always placed Section 3 of the Act in a position of outstanding importance. Mr. Justice Harlan:

> "The purpose of congress was to cut up by the roots every form of discrimination, favoritism, and inequality." (*Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 478, 55 L. Ed. 297, 31 Sup. Ct. Rep. 265.)

Mr. Justice White:

> "It cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism." (*New York, New Haven & Hartford R. Co.* v. *I. C. C.*, 200 U. S. 361, 391.)

In seeking the enforcement of Section 3 of the Act which

is described by the Supreme Court as stated "in very broad terms", and "should be broadly construed and strictly enforced", this Appellant, in this contest between rail and water carriers, is well within its rights as found by this Court in *Penn. R. Co. v. U. S.*, 323 U. S. 588. It was there contended by the railroads that the power of the Commission to fix joint through routes in the "public interest" meant the general public and not an individual shipper. The Supreme Court there held that "public interest" as employed in the Act includes the interest of one single complainant seeking enforcement of any section of the Act. Upon this well-ascertained determination, Appellant is here seeking the "equality of rates" that Mr. Justice White states that we are entitled to under Section 3 of the Act and which Section the Commission's Examiner finds on this record is violated by the existing barge-rail rates on the Warrior River.

The decision of the Court, and also the motions to affirm, rely upon their misstatement that we are seeking to deprive our competitors of the advantage of location upon the river. The palpable error of this assertion is answered hereinafter.

This reply is confined to the effect of the Court's decision and the motions to affirm upon the interstate traffic of this appellant, leaving to the reply of the railroads the other features of the case. In the conflict between the water and rail carriers, the rights of a shipper cannot be set aside under the expressed provisions of the statute, enacted primarily for the protection of shippers in interstate commerce, as held by the Supreme Court in the decision above cited.

POINTS COVERED.

Following the plan hereinbefore outlined, our reply will undertake to show:

1. That the Court and also the motions to affirm misstate the position of this appellant.

2. That the value of barge-rail service in the transportation of sugar is as great as the value of rail service, due to the commercial advantages in the sale and distribution of sugar via barge routes.

3. That the service on the Warrior River has always operated at a heavy financial loss and all hope of successful operation has been abandoned, as found by the Examiner of the Commission and admitted by the Federal Barge line.

4. That the absorption by the barge line of the barge-rail differential creates a violation of Section 3 of the Act against this appellant.

5. That the argument in the motions to affirm that the cost of service record was stale demonstrates that the case was decided without a full hearing.

BRIEF.

I.

Both the decision of the Court and the motions to affirm, in so far as the interest of this appellant in this case is concerned, palpably and without excuse misstate our position. We have repeatedly, upon brief and oral argument, defined our status in this case in which we are striving to protect our right to equal rates with our competitors justified by the inherent advantage of lower cost rail transport. It is therefore a flagrant misstatement to assert that we are seeking to take away from our competitors the advantage of their location upon the Mississippi River. (Sheet 3 of Court's decision.) Nothing could be further from the truth. Under the law such natural advantage cannot be set aside. These carriers are all chartered to serve the public, not each other, and the public includes this appellant.

No one is objecting to giving the New Orleans refiners the benefit of their location. If they have any natural advantages they are entitled to them under the law. What we are objecting to is the extension to these large New Orleans refiners of "unnatural" advantages at the expense of ourselves and others. There is no "public policy" that does or can support such an evil theory of transportation.

II.

The motions to affirm are based in part upon the assertion that even if the barge-rail service is rendered at a higher cost than the rail service, the lower differential rates are justified because of the lower value of the barge-rail service. This assumption is not true as to the barge-rail

service on sugar, and with respect to the traffic of this appellant this defense wholly fails.

The decided advantage of barge-rail service over rail service in the transportation of sugar is conclusively conceded by the testimony of witnesses representing the New Orleans refiners who use the service extensively. It is also testified to by the officials of the Federal Barge line.

III.

The unlawfulness of the barge-rail rates via the Warrior River was found by the Examiner of the Commission. This service reaches right into the heart of the southeast in direct competition with the Savannah refinery. The Examiner finds that "clearly they (barge lines) have no hope of putting the Warrior service on a paying basis". In other words, he finds that this service is rendered at less than cost, and that the Federal Barge line concedes that it can never be otherwise.

The Examiner recognizing the unlawfulness of the existing differential in rates states that if the barge line "performed service at less than cost, it would be guilty of an unfair and destructive practice which might call for the exercise of the Commission's restraining powers." (Sheet 30.) The Examiner then states that "clearly they (the barge lines) have no hope of putting the Warrior service on a paying basis."

The record shows that the upstream tonnage on the Warrior has been principally sugar from the New Orleans district, moving right into the heart of the district that the Savannah refinery was constructed to serve, at preferential barge-rail rates lower than the cost of service. Appellant has been forced to absorb the differential between the all-rail rates and the barge-rail rates in the sum of

$464,133.00, up to the time of the hearing on tonnage in three states alone, every penny of which has been an unlawful exaction in violation of law, duly found upon the record by the Examiner.

IV.

The Motions to Affirm rely upon the statement by the Court that "in the joint rates established the railroads retain their regular rates; the differential between the all-rail rates and the barge-rail rates is absorbed by the barge lines". (Sheet 9.) The argument of the Court is that the railroads therefore will not be hurt when forced to join in the lower differential barge-rail rates. The fallacy of this theory is answered fully in the reply of the railroads, but the disingenuousness of this claim when applied to the competitive rates on sugar stands out. Regardless of how these carriers may divide up the joint rate between them, the unlawful discrimination against this appellant continues in full force.

V.

The motions to affirm assert that the cost of service evidence is "worthless" because among other things it is "stale". The staleness, if true, is due solely to the procrastination of the Commission in deciding the case years after it was submitted. To arbitrarily set aside one-fourth of the immense record prepared at great expense by highly competent and skillful experts for the reasons offered savors of extremely arbitrary action. Under the condition thus presented the proper procedure was to set the case down for further hearing and bring the record down to date. To do otherwise results in depriving the parties of their statutory right to a full hearing under the Act. The

Supreme Court has held that an order cannot lawfully rest upon a stale record. *Atchison, Topeka & Santa Fe* v. *U. S.*, 284 U. S. 248.

Conclusion.

The opening paragraph of the statute setting forth the National Transportation Policy requires "fair and impartial regulation of all forms of transportation, *without unfair destructive competitive practices.*" (Italics supplied.)

It is apparent from the foregoing pages that this appeal presents issues extremely vital to this appellant. That due to the misapprehension of the Court as shown by its misstatement of our position; the admissions against interest of our opponents; and the findings of the Commission's Examiner as to unlawful operation on the Warrior River; the lack of evidence in support of the prescribed commodity rates, as found by the Commission's Examiner; the motions to affirm rest upon a misconception of the law and a misapprehension of the facts. For these reasons and for others set forth in this reply, it is requested that the motions to affirm be denied.

Respectfully submitted,

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April 12, 1950.